IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1338 OF 2005
IN
SUIT NO.1233 OF 2005

ITC Limited ... PLAINTIFF

V/s.

Rajani Food Products and Anr. ... DEFENDANTS

Mr. Rahul Chitnis with Mr. P.P. Paul for the plaintiff
None for the defendants.

CORAM : ANOOP V. MOHTA, J.
DATED : 21st April, 2006

P.C.

. The plaintiff's suit is for orders restraining the defendants or its agents or servants in any manner using any biscuits or confectionery marks "SUNSHINE GLUCOSE" or any other deceptively similar word mark so as to pass off or enable others to pass off the goods of the defendants as and for the goods of the plaintiffs and further for using or exposing or offering for sale any goods bearing the impugned label, colourable imitation or substantial reproduction of the plaintiff's artistic work, so as to infringe the plaintiff's copyright in the original artistic work. It has been further prayed for other connected and related reliefs including damages.

2. Heard counsel for the plaintiff. None

appeared for the defendants though served on 4th May, 2005. The basic ingredients as contemplated under the Copyright Act and Tread Mark Act, 1999. Order 39 rule 1 to 3 of the Civil Procedure Code (CPC) have been made out by the plaintiff in the plaint as well as in the affidavit in support of Notice of Motion in question. As the same remained uncontroverted till this date and taking those averments as undisputed position on record, I am inclined to confirm the ad-interim order dated 2nd May, 2005 passed in this Notice of Motion. The learned Judge while passing ad-interim order as noted primafacie-case and material in favour of the plaintiff and passed the order in terms of prayer clause (a) of Notice of Motion. Liberty has been granted to the defendants for modification of this order by giving 24 hours written notice to the plaintiff. As noted, there is no such application or Notice of Motion has been taken out by the defendants for modification of this order. This order still remains intact as there is no appeal preferred by the defendants as per the statement made by the Counsel appearing for the plaintiff. This order has been in force since 2nd May, 2005.

3. Apart from the above, I have gone through the

averments made in the plaint as well as the affidavit in support of Notice of Motion and the exhibits annexed to the plaint. The following necessary materials are sufficient at this stage to confirm the ad-interim order as granted.

a. The plaintiff’s word marks/labels are "SUNFEAST" and/or "SUNFEAST GLUCOSE", which have been conceived in about 30th June, 2005.

b. The plaintiffs have been carrying on the business of manufacturing and marketing the biscuits of various types.

c. The plaintiffs have created artistic work in respect of the biscuits through one Mrs. Zoya Riyas who was at the relevant time in the employment of a company. Said artistic work has been assigned by the said company in favour of plaintiff by executing a deed of assignment dated 30th June, 2002. In the result the entire copyright in question assigned in favour of the plaintiffs. The company has also by a letter dated 30th June, 2003 gave their no objection to the plaintiffs getting the copyright in respect of the said artistic work registered. The plaintiffs

have been using said artistic work as a label marks and selling the biscuits under the word marks in question on extensive scale.

d. The plaintiffs have spent huge amount by way of publicity and advertisement and gained the popularity of their word marks and label marks. The same have been marked extensively by the plaintiff. The said word marks and labels therefore are closely associated by the traders and members of the public exclusively with the plaintiffs.

e. The plaintiffs have made an application for a registration of the trade marks consisting of word mark, as also the label marks containing the words in question, having distinctive features.

f. (a) The plaintiffs have filed a suit bearing No. 935 of 2005 for an order and injunction restraining the defendants from manufacturing and/or selling the biscuit under the brand name SUNRISE AND/OR SUNRISE GLUCOSE and further from encroaching plaintiffs' copyright label bearing plaintiffs word. By order dated 28th March, 2005 in the Notice of Motion No. 925 of 2005 this Court has granted an

ad-interim relief in terms of prayer clauses (a) & (b) and restrained the defendants from using said words and labels. The Receiver has been appointed under Order 40 Rule 1 of the Civil Procedure Code (CPC). The Court Receiver seized the sizable quantity of the infringed products.

g. During the implementation of the said order, the plaintiff came to know that the defendants have started manufacturing and selling biscuits under the trade mark/labels SUNRISE GLUCOSE which are deceptively similar to the plaintiffs' labels/ marks. This is amounting to an infringement of the plaintiffs' copyright in the original artistic work.

h. The plaintiffs have also filed a complaint u/s 63 of the Copyright Act, 1957 and u/s 420 read with Section 120 B of the Indian Penal Code at Hyderabad on 01-04-2005. A huge quantity of the defendants' products were seized during the raids. The defendants have copied the labels which are close and distinctively similar and also adopted the word mark SUNSHINE GLUCOSE which are deceptively similar to the plaintiffs' word marks SUNFEAST and/or SUNFEAST GLUCOSE and creating confusion amongst people and

traders and members of the public. The defendants have adopted the letter and style the entire colour combination scheme, get up and the layout of the plaintiffs' label marks. The defendants have also copies plaintiffs' artistic work.

i. Both these goods are ordinarily available across the counter and are being purchased by all strata of the society. The intention of the defendant is therefore clear to deceive and cause confusion and to sell its products in the same market and to exploit the already established popularity and market of the plaintiffs. The defendants are therefore passing of or enabling others to pass off the defendants goods as and for the goods of the plaintiffs.

j. The plaintiffs carry on business in Mumbai. The cause of action is continuous one. The present suit is within limitation. The leave under clause XIV of the Letters Patent by combining the cause of action in respect of passing off with the cause of action of infringement of copyright have been obtained.

k. There is no defence raised of any kind in the present case. In Croom's Trade Mark Applications

[2005] R.P.C. 2 based on the foreign judgment under Trade Marks Act, 1994 (English Law), it has been observed as under :-

> "I understand the correct approach to be as follows. when rival claims are raised with regard to the right to use a trade mark, the rights of the rival claimants fall to be resolved on the basis that within the area of conflict :

(a) the senior user prevails over the junior user;

(b) the junior user cannot deny the senior user’s rights;

(c) the senior user can challenge the junior user unless and until is it inequitable for him to do so.

In the present case, as observed above, there is no rival claim raised of any kind with regard to the use of the trade marks in question.

l. The similarity tests and the likelyhood of confusion are also relevant factors which need to be

taken into account in the facts and circumstances of the case. In credit master trade mark [2005] R.P.C. 21 (C.D.) based on a well known case of Sabel BV V/s. Puma AG [1998] R.P.C. 199 at pg. 224 observed as under :-

> "The global appreciation of the visual, aural or conceptual similarity or the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. ... The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details."

4. In view of above undisputed position on record, I am inclined to confirm prayer clause (a) as granted by this Court.

Clause (a) :- That pending the hearing and final disposal of the suit, the Defendants by themselves, their servants and agents be restrained by an order and injunction of this Hon’ble Court from any manner using and/or exposing or offering for sale any goods

bearing the impugned labels, using Exhibit-M to the Plaint or any colourable imitation or substantial reproduction of the Plaintiff's artistic works, being Exhibits C and H-2 to H-10 to the Plaint so as to infringe the plaintiff's copyright in the original artistic work, Exhibits C and H-2 to H-10 to the Plaint.

5. In view of this, the Notice of Motion is partly allowed accordingly with liberty to take up appropriate proceedings, if necessary, as far as other prayers are concerned. No costs.

[ANOOP V. MOHTA, J.]